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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 164

SAM A. WILSON,

Petitioner,

vs.

JOHN N. THELEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

*To the Supreme Court of the United States and the Honorable
Justices thereof:*

The petition of Sam A. Wilson praying for a Writ of Certiorari on the ground that the Courts of Montana have denied full faith and credit to a final judgment rendered in the United States District Court of Wyoming, and in support thereof respectfully shows to this Honorable Court:

(The references herein are to the Transcript of the Record as used in the Supreme Court of the State of Montana as Tr.—).

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On November 25, 1938, a judgment and decree was entered by the District Court of Toole County, Montana, upon Findings

of Fact, Conclusions of Law and Order for Judgment that John N. Thelen, Respondent herein, was, ever since the 20th day of September, 1932, the legal owner of certain interests in lease holds in Toole County, Montana, and that the petitioner Sam A. Wilson has no right, title, estate, demand or lien in, to, or upon said property, or any part thereof. (Tr. 108 to 120)

From this judgment an appeal was taken to the Supreme Court of the State of Montana, which Court affirmed the decree entered in the trial Court by a decision filed on March 18th, 1940, and a remittitur was thereafter returned to the Clerk of the District Court of Toole County, Montana, whereby said judgment became and is a final judgment.

Petitioner, in 1929, began a suit in the United States District Court for Wyoming against John N. Thelen, Ferdig Oil Company through whom John N. Thelen, respondent herein, acquired the leasehold interests in question, and also against S. C. Ferdig and others, which petition was based upon a contract made between petitioner and S. C. Ferdig and one H. L. Lowe whereby it was agreed that said parties become joint adventurers in acquiring and developing oil lands and leases in Montana and elsewhere; that each of said parties were to own a one-third interest in such lands and leaseholds and personal property thereafter to be acquired by S. C. Ferdig. That S. C. Ferdig, pursuant thereto, did thereafter acquire lands and leaseholds, equipment and other personal property in Montana and Wyoming and failed to perform said contract and recognize an interest in Wilson, but, on the contrary, conveyed the leasehold interest and other property involved in this action, to the Ferdig Oil Company which was at that time managed and controlled by said S. C. Ferdig, and said corporation was charged with knowledge of the agreement made with Wilson. That the parties to said suit had perpetrated a fraud upon your petitioner by denying him an interest in said assets and attempting to prevent him from so claiming said property by various transfers. A determination of the rights of the parties in the lands and leaseholds and personal property thus acquired, and the appointment of a receiver for the defendants was prayed for. (Exhibit 8, pages 28 to 72)

S. C. Ferdig was then a resident of the State of Wyoming,

and president of the Ferdig Oil Company; respondent John N. Thelen was a resident of the State of Montana; and petitioner a resident of the State of Minnesota; H. L. Lowe was a resident of the State of Wisconsin, but was not served with process.

Thelen, Ferdig, Ferdig Oil Company and other defendants appeared and moved to dismiss the action for lack of jurisdiction and on other grounds, which motions were denied. (Exhibit 8, pg. 24, ans 74 to 77) Whereupon these defendants appeared generally by answer denying the claims of your petitioner and asserting affirmative defenses on which they asked relief. (Exhibit 8, pgs. 81 to 113)

After a trial upon the merits, the Court dismissed the action as to Thelen for lack of proof of any fraud on his part and found that the agreement was made between Wilson, the petitioner herein, and S. C. Ferdig as claimed, and that petitioner owned a one-third interest in lands, leaseholds and personal property acquired by said S. C. Ferdig, including the leaseholds and other personal property involved in this present action, which said Ferdig had conveyed to the Ferdig Oil Company with knowledge on the part of the Company of the ownership of a one-third interest in petitioner, which findings were made on December 11th, 1931, and judgment was entered accordingly on said date. (Exhibit 8, pgs. 117, 119) An appeal was taken to the Circuit Court of Appeals upon an issue involving the Cody Petroleum Company which was determined in 1933. On June 6th, 1933, a receiver was appointed for the Ferdig Oil Company. That said judgment so entered on December 11th, 1931, remains in full force and effect.

On March 31st, 1936, three years after the commencement of the present suit, respondent Thelen came back into the original action in Wyoming, and, together with Ferdig Oil Company and one F. J. Buscher, who was then president of the Ferdig Oil Company and interested in the property in question, filed a petition attacking the jurisdiction of the Wyoming Court praying for an order vacating the judgment and dismissing the Wyoming action. (Exhibit 8, pgs. 224, 232, 236) This motion was denied by the trial court. (Exhibit 8, pgs. 243-247)

An appeal was taken by the moving parties to the Circuit Court of Appeals of the Tenth Circuit, (Exhibit 8, pg. 247)

which Court affirmed the trial court in a decision filed August 27th, 1937, and found in 91 Fed. Reporter, 2nd series, on page 857, that

"The bill alleged that complainant, appellee here (Wilson) was then a resident of the State of Minnesota, and a citizen of the United States; that the Delaware corporations (including Ferdig Oil Company) were citizens and residents of the state of their creation; that S. C. Ferdig and his wife I. E. Ferdig were residents of Cody, Wyoming; that the two common law trusts were citizens and residents of Montana; that they and some of the named corporation defendants had property and effects in the state of Wyoming; and that the amount in controversy exceeded the value of \$3,000 exclusive of interest and costs.

The basis of the complaint was an alleged joint adventure agreed upon in January, 1924, between S. C. Ferdig, H. L. Lowe and the plaintiff, Wilson, each to share a third interest therein; that Ferdig represented that he was then drilling an oil well in Montana on a lease which required a cash payment of \$2,000 and an additional payment of \$6,000 out of earnings in any oil that might be found on the property; that he was then without means and unable to pay the \$2,000 due; that he had a drilling outfit which was incomplete and only partially paid for and he required financial assistance to go on. He also represented that he was skilled in locating, exploring and drilling for oil and believed that if he could obtain sufficient finances to drill one well the income would finance the drilling of additional wells on that lease and elsewhere."

The Court also states that each of the three were to have a one-third interest in the assets and profits resulting from said joint adventure; that Wilson performed his part of the contract; that Ferdig thereafter shifted titles of the leases to other defendants and to himself and wife, and that it was claimed by Wilson in his complaint that Thelen entered into a conspiracy to cover up the title and interest of Lowe and himself in the joint adventure, and that the Ferdig Oil Company was organized

in part for that purpose and ignored the interest of Wilson. Wilson prayed that his interest in all the leases and in the oil that had been produced be ascertained by the Court and that a receiver be appointed to take charge of and operate the property so far as that might be necessary to protect the rights of complainant.

The Court then refers to the present action commenced in the State of Montana, wherein it is claimed that Thelen was producing oil under a lease which belonged to the Ferdig Oil Company and that he had acquired the leaseholds through tax sales of property and otherwise, and it denied that he had any title or equity in good conscience to said property and asked the Court to so adjudge and that Wilson be decreed to be the owner of a one-third interest in said property and entitled to an accounting for the profits. The Court says:

“But when the nonresident defendants came in with their answers to the merits and plead affirmative defenses on which they asked relief they submitted themselves and their rights in the controversy to the full jurisdiction of the court over their persons and over their property in which appellee claims an interest wherever situate. Simkins Federal Practice (Rev. Ed.) Chapters LXXXI, LXXXII; Foster, Federal Practice (6th Ed.) Vol. 1, Ch. VII; Dana v. Searight (C. C. A.) 47 F. (2d) 38.”
91Fed. Rep. 2d. (857-860)

From this decision no appeal was taken to this Court and a mandate was duly returned to the trial court and said judgment entered in the United States District Court of Wyoming thereby became final.

Prior to the trial of the Wyoming suit, but after its commencement, the Oil Well Supply Company had started a suit in Toole County, Montana, to foreclose a lien upon the leasehold interests of the Ferdig Oil Company described in the present suit and described in the Wyoming suit. Respondent Thelen thereafter, and with full knowledge of the suit of the petitioner in Wyoming, and with knowledge of the claim he made to own a one-third interest in said property, purchased the Oil Well Supply

Company claim, and at a decretal sale held on July 10th, 1931, purchased the interest of the Ferdig Oil Company in and to the leasehold interests involved in this proceeding from which sale no redemption was made. Respondent Thelen had previously acquired tax assignment certificates, but title under them was never perfected. During this time Thelen was attorney for the Ferdig Oil Company, was Vice-President of the Yellowstone Petroleum Company which owned eighty-two per cent of the Ferdig Oil Company stock, and his law partner, Freeman, was an officer of the Ferdig Oil Company. Evidence was produced that respondent Thelen had been employed by the Ferdig Oil Company to protect it against the claim of the Oil Well Supply Company, or, at least to procure the claim so that it would be in friendly hands. Respondent was acting for the Ferdig Oil Company when he procured the tax assignment certificate.

On July 27th, 1931, respondent Thelen testified and took part in the trial of the Wyoming suit, but failed to disclose his interest in the properties although the decretal sale had taken place on July 10th, less than two weeks previously. (Tr. 344 to 345)

In June, 1933, this present suit was commenced in Toole County, and was brought to obtain a judgment that respondent had no claim to the one-third interest in the leaseholds and personal property which was adjudged in the Wyoming suit to belong to this petitioner and to have decreed that the title and claim of plaintiff thereto was good and valid and enjoining respondent from asserting any claims thereto. Your petitioner in this suit set forth in his complaint, and on the trial, relied upon the determination of the Wyoming Court construing the agreement here relied upon, and upon the trial offered in evidence the duly authenticated copy of the Findings of Fact, Conclusions of Law and Judgment and Decree in the Wyoming suit, claiming it was a final determination of the rights of petitioner under his agreement with Ferdig as against Ferdig and the Ferdig Oil Company against whom the judgment was entered, and claiming also that it was a final determination as to Thelen who was a party to the Wyoming suit, and who was in privity with the Ferdig Oil Company having acquired the property through this corporation Ferdig Oil Company and with the

knowledge of the claims of the petitioner. The trial court received the evidence over the objection of respondent, but rendered his decision in favor of respondent on the ground that the Court of Wyoming was without jurisdiction and hence the judgment and decree was not res adjudicata as to the claims of petitioner and did not estop respondent from denying the contract between petitioner and Ferdig, and the Court found that respondent was the owner of the property including the one-third interest which the petitioner claimed in and to the leaseholds, wells, tools and equipment and oil and gas removed therefrom, which the Wyoming Court found was held by the Ferdig Oil Company for the use and benefit of petitioner. Judgment and decree was thereupon entered on November 25th, 1938.

It was from this judgment and decree that an appeal was taken by your petitioner to the Supreme Court of the State of Montana. The Supreme Court of Montana held that the Federal Court of Wyoming was without jurisdiction to adjudicate title to the lands in Montana; that the judgment there entered was not res adjudicata as to Thelen and Buscher (Buscher having acquired a portion of the Thelen interest) nor were they estopped from again litigating the question of the agreement between petitioner and Ferdig, and found that no joint adventure existed between petitioner, Ferdig and Lowe; that petitioner was guilty of laches in asserting his claims against said Respondent Thelen and against said Buscher. Said decision was rendered on March 18th, 1940, judgment was entered pursuant thereto, and the case remanded to the District Court of Toole County.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. In arriving at its decision, the Supreme Court of the State of Montana found that the pleadings in the Wyoming case raised the question of title and ownership to the land here involved, that the answer of Thelen did not set forth facts constituting his chain of title, but it is firmly established that an action to determine title to or an interest in real estate is local and that the courts of one state have no jurisdiction to litigate title to lands in another state.

2. In arriving at this conclusion the Court ignored the fact that the Wyoming suit was based upon a contract, a trust, and a claim of fraud, purely transitory causes of action. The Court failed to recognize the well settled law that in such actions title to lands in other states may be litigated if an incident of such litigation.

3. In refusing to recognize the jurisdiction acquired by the Wyoming Court through the appearance of the defendants and their answer to the merits and assertion of affirmative relief, the Court disregarded the decision of the United States District Court of Wyoming and the Circuit Court of Appeals for the Tenth Circuit in deciding the claim of respondent upon the motion of said Thelen for an order to vacate the judgment, and the Court failed to consider the clear implications of decisions of this Court upon the subject.

4. The Court failed to recognize that a joint adventurer is not a necessary party to litigation involving the claims of one joint adventurer against another and failed to give due consideration to the uncontradicted evidence that H. L. Lowe had settled his claims to any interest in the property before petitioner's suit was commenced in Wyoming and had dismissed his action brought to establish his claim, and therefore said Lowe made no further claim to any assets of the joint adventure.

5. The Court failed to give full faith and credit to the Wyoming judgment as establishing the fact of the agreement between Wilson and S. C. Ferdig, and that by the terms thereof Wilson owned a one-third interest in and to the lands, leaseholds and other personal property acquired by S. C. Ferdig in Montana and Wyoming, and that as a result thereof the transfers by said Ferdig to the Ferdig Oil Company were made with notice of such claims and hence said property was charged with a trust, which judgment was rendered in a Court having jurisdiction over the parties and over the subject-matter,—the contract and trust,—and that these issues were adjudicated as to the Ferdig Oil Company and those in privity with it, including respondent Thelen, and that by reason thereof, respondent Thelen was estopped from again litigating these questions. Whether the Wyoming Court thus determined title to lands in Mon-

tana is not important. The judgment in Montana determined that a contract existed between petitioner and Ferdig and the terms thereof, and that Wilson had performed and that Ferdig had breached the same. Had the Montana Court given the full faith and credit due this judgment in the action before it to enforce the agreement thus determined, the Court would, of necessity, have been required to render judgment in favor of petitioner.

6. The Court failed to recognize that the claim of the Oil Well Supply Company was against the interest of the Ferdig Oil Company only.

7. The Court failed to give due consideration to the acquisition of the interest of the Ferdig Oil Company by respondent with knowledge of petitioner's claims. Hence said respondent acquired no greater rights than those held by the Ferdig Oil Company.

8. The effect of the decision by the Court in Montana is to hold that while the United States Court in another State has determined the terms of a personal contract and an actual trust created thereby, and a resulting trust arising from the acts of the parties, as well as from a fraud perpetrated by the defendants, nevertheless the issues were permitted to be again litigated in the Courts of Montana in an action wherein the decree is not claimed to be the source of title.

9. The effect of the decision is to deny to the United States District Court of Wyoming, jurisdiction to determine all of the issues incident to a contract made in Wisconsin contemplating business transactions in Montana and elsewhere, and to require trials in various states should the business of the parties extend over several states.

10. The effect is to permit respondent, Ferdig Oil Company, John N. Thelen and F. J. Buscher to attack the jurisdiction of the United States District Court in Wyoming, and to appeal to the Circuit Court of Appeals from an adverse decision, and yet not be bound by an adverse decision therein, but permit said parties to again litigate the same issues.

WHEREFORE your petitioner respectfully prays that this petition be granted, that a writ of certiorari issue to the Supreme Court of Montana to review the final judgment entered pursuant to its decision on appeal from the judgment entered in the District Court of Toole County, Montana.

SAM A. WILSON, *Petitioner*

By THEO. HOLLISTER
AUSTIN LATHERS
JAY H. HOAG
LOUIS P. DONOVAN
Counsel for Petitioner.

JOHN D. JENSWOLD
Of Counsel.

STATE OF MINNESOTA,
COUNTY OF ST. LOUIS—ss.

Jay H. Hoag being duly sworn, says that he is attorney for Sam A. Wilson, the petitioner named in the foregoing entitled matter; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief, and that the reason this verification is not made by petitioner is that he is absent from the County of St. Louis and State of Minnesota, wherein affiant resides.

JAY H. HOAG

Subscribed and sworn to before me
this 12th day of June, A. D. 1940.

A. M. GOCINS

Notary Public, St. Louis Co., Minn.,

My commission expires Sept. 6, 1946.

(NOTARIAL SEAL)

